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No. 04-294

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN FOUNTAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR REHEARING

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I. PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner John Fountain respectfully petitions the Court for rehearing. The grounds for the petition are based on, *inter alia*, intervening circumstances which were only made apparent to the Petitioner in light of this Court's April 26, 2005, Opinion, rendered in *Pasquantino v. United States*, 544 U.S. ___ (2005). Additionally, the Petitioner relies on further independent constitutional claims in support of his petition for rehearing which were not previously presented which demonstrate that, although the Petitioner entered a plea of "guilty", that the Petitioner is actually innocent.

II. DISCUSSION

Following Petitioner's conviction, two legal developments occurred. First, the Second Circuit, in *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000), held that "... without evidence that Canada imposes duty on imported liquor in the first place, the government cannot prove a scheme to defraud the Canadian government because there is no evidence whatsoever of a property right – a right to revenue – of which the government could be defrauded. Second, this Court held, in *Cleveland v. United States*, 531 U.S. 12 (2000), that unissued state video poker licenses did not qualify as "property" within the compass of the mail fraud statute – identical in all relevant respects to the wire fraud statute ... [a]s Justice Ginsburg stated, writing for a unanimous Court, "It does not suffice ... that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained *must be* property in the hands of the victim." *Cleveland*, 531 U.S. at 15. Subsequent to Petitioner filing his motion pursuant to 28 U.S.C. § 2255, this Court decided *Pasquantino* which, for the first time, identified the Canadian Statutes presumably relied upon by the government in support of its contention that the Canadian government imposes taxes on imported alcohol and, *a fortiori*, tobacco.

A. The Petitioner John Fountain is actually innocent.

In support of its denial of Petitioner's petition for habeas corpus, the Second Circuit noted as follows:

> Finally, at oral argument, Petitioner expressly disavowed reliance on an argument that others involved in the same conspiracy have made – that the government did not prove the existence, under federal law, of the statutory scheme according to which Canada enjoys the right to collect taxes. See *United States v. Pierce*, 224 F.3d 158, 165-66 (2d Cir. 2000). Therefore, for purposes of this appeal only, we assume the existence of such a statutory scheme.
>
> Because the decision in *Cleveland* did not affect courts' pre-existing consensus that taxes owed to a government – whether state, federal, or foreign – are property in the hands of that government, Fountain cannot meet his burden of demonstrating actual innocence.

Petitioner having sought out the defendant in *Pierce* since this Court's May 2, 2005 denial of his Petition for a Writ of Certiorari now respectfully asserts and places reliance on the argument that defendants in *Pierce* have made – that the government did not [and could not] prove the existence, under federal law, of the statutory scheme according to which Canada enjoys the right to collect taxes. *See In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Accordingly, the resolution of the Petitioner's actual innocence claim necessarily requires the Court to carefully examine not only the validity of the Treaty with the Seven Nations of Canada, 1796, 7 Stat. 55 (hereinafter "the Seven Nations agreement"),[1] but also the United States Constitution.

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[1] As will be discussed herein, it is problematic whether this document, although denominated a treaty, is, in fact, a treaty executed in accordance with the United States Constitution.

The United States Constitution dictates that treaties, like federal legislation, are both the supreme law of the land. The Constitution could not be more clear in that regard: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." U.S. Const., art. VI, cl. 2. Thus, "[u]nder our constitutional system, treaties and statutes are both the supreme law of the land, and the constitution sets no order of precedence to differentiate between them." *U.S. v. Palestine Liberation Organization*, 695 F.Supp. 1456, 1465 (S.D.N.Y. 1988) (citation omitted). In other words, "[b]etween treaty law and federal statutory law there is thought to be a virtual equivalence." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 89 (2d ed. 1993); see also *Foster and Elam v. Neilson*, 2 Pet. 314 (1829) (Marshal, C.J.) ("That a treaty is to be regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.").

This fundamental principle governing the relationship between treaties and federal statutes controls regardless of whether the treaty is one between the United States and a foreign country or whether it is a treaty with an Indian tribe. *Cf. United States v. State Tax Com'n of State of Miss.*, 505 F.2d 633, 639 (5th Cir. 1974) ("[T]hese Indian treaties, when ratified by the Senate, assumed equal status with the Constitution itself as part of the 'supreme law of the land.'"). That is so because, as with other treaties, "[t]reaties with Indian Tribes are contemplated by" article II of the Constitution, granting the President the power to make treaties with the advice and consent of the Senate, and also by the supremacy clause. Felix S. Cohen, *Handbook of Federal Indian Law* 62 (citation omitted) (Rennard Strickland, et al., eds. 1982 ed.) (hereinafter "HANDBOOK").

On May 31, 1796, an "important land cession"[2] occurred between the State of New York and the St. Regis, along with several other tribes. On that date, through the Seven Nations agreement, the Indians purportedly agreed to "cede, release and quit claim to the people of the state of New-York, forever, all the claim, right, or title of them, . . . , to lands within the . . . state. . . ." See Treaty with the Seven Nations of Canada, 1796, reprinted in II C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 45-46 (1904) (hereinafter "KAPPLER"). In addition, that Treaty "reserved" a "tract equal to six miles square, . . . *to be* applied to the use of the Indians of the said village of St. Regis. . . ." Id. The Treaty's proclamation date, or what is sometimes referred to as the date of "ratification," or the date upon which the President of the United States "formally confirm[s] the treaty, sign[s] it, and affixe[s] the great seal of the United States[,]"[3] was January 31, 1797. See AMERICAN INDIAN TREATIES 446. As a ratified treaty, this 1796 Treaty appears in the leading compilation of United States treaties with American Indian tribes, "which takes its text from the official publication in the United States Statutes at Large."[4] See KAPPLER 45-46.

Because treaties enacted under the authority of the United States Constitution "by themselves were not sufficient for managing relations with the Indians[,]" between 1790 and 1834, Congress enacted a series of laws governing trade and intercourse with the Indians. See AMERICAN INDIAN TREATIES 100. Basically, the first Nonintercourse Act, enacted in 1790, codified the policy of federal restraints on alienation of tribal lands,[5] in that,

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[2] HANDBOOK 74.

[3] FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES THE HISTORY OF A POLITICAL ANOMALY (hereinafter "AMERICAN INDIAN TREATIES") 446 (1994).

[4] Id.

[5] Between 1793 and 1822 the statutory policy embodied in the 1790 Nonintercourse Act was carried forward without major change.

(Continued on following page)

among other things, it prohibited tribes from selling their lands unless the sale was "made and duly executed at some public treaty [] held under the authority of the United States." 1 Stat. 329, 330-31, § 8. See generally FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834. Thus, in effect, "only the United States government could purchase Indian lands. . . ." HANDBOOK 111.

As previously mentioned, the Seven Nations of Canada and the State of New York entered into an agreement on May 31, 1796, and that agreement was subsequently proclaimed by then President George Washington. Although denominated a treaty (historically), this document can be nothing more than an agreement given that the U.S. Constitution dictates that, "[the President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, *providing two thirds of the Senators present concur*; . . . ". U.S. Const. art. II, § 2, cl. 2. Therefore, the subsequent proclamation could not, standing alone, have the effect of executing that agreement in accordance with the U.S. Constitution. Equally troublesome, obviously, is the fact that one of the contracting parties to the Seven Nations agreement was the "State of New York." Again, this document can be nothing more than an agreement given the constitutional prohibition that, "[n]o State shall enter into *any* Treaty, Alliance, or Confederation; . . . ". U.S. Const. art. I, § 10, cl. 1. However, the U.S. Constitution does contemplate the ability of a state to enter into an agreement with a foreign Power provided the state has the consent of Congress. Specifically, the Constitution states that, "No State shall, *without the Consent of Congress*, . . . enter into any Agreement or Compact with . . . a foreign Power, . . . ". U.S. Const. art. I, § 10, cl. 3.

In view of the foregoing, Petitioner respectfully avers in support of his actual innocence claim that it is absolutely necessary for the Court to examine the legislative

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HANDBOOK 110 n. 388. It was then codified from the Act of June 30, 1834. Id. (citations omitted).

history pertaining specifically to the Seven Nations agreement in order to determine the intent of the parties to that agreement and to determine whether the President (George Washington) ever submitted that agreement to the Senate for constitutional action or, otherwise, to determine whether the "state of New-York" had the constitutionally required consent of Congress to enter into that agreement. Indeed, if such be invalid pursuant to the Constitution, the government could not prove the existence, under federal law, of the statutory scheme according to which Canada or New York State enjoys the right to collect taxes in the first place. See *United States v. Winans*, 198 U.S. 371, 381 (1905) ("In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted.").

The Seven Nations agreement purportedly, "cede[d], release[d] and quit claim[ed] to the people of the State of New-York, forever, all the claim, right, or title of them, . . . to lands within the . . . state . . . ". The language of this unlawful agreement clearly states that the "cession" was to the "people of the State of New York" and not to the United States government. It follows then, assuming *arguendo* the validity of that agreement, that the power of Congress cannot be construed to extend to such lands or territory in accordance with the Constitution in the absence of a lawful agreement granting such authority from the State of New York or, perhaps, the Indians of the village of St. Regis. In this regard, the U.S. Constitution states, "[t]he Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . . ". Const. art. IV, § 3, cl. 2. As the foregoing demonstrates, by its terms, the lands or territory "ceded" are neither the lands nor the territory of the United States or, otherwise, "[p]roperty belonging to the United States". Therefore, if the Court finds for the reasons set forth herein or, otherwise, that the Seven Nations agreement was not executed in accordance with the Constitution or is in any way repugnant to the Constitution, the Petitioner respectfully submits that it is therefore the duty of this

Honorable Supreme Court to strike it down and declare it to be void and of no force and effect.

1. Pasquantino and the identification of Canada's supposed taxing authority.

Petitioner avers that the identification of the Canadian Statutes in *Pasquantino* which the government would have presumably relied upon to show that the Petitioner conspired to participate in an "illegal" venture to smuggle tobacco and liquor products from the United States into Canada through the "St. Regis Mohawk Indian Reservation" *to avoid the payment of Canadian taxes and duties* "levied" upon the importation of tobacco and liquor products by Canada is significant. Specifically, this Court's Opinion in *Pasquantino* contained the following: "[d]uring the time of Petitioners' smuggling operation, between 1996 and 2000, Canada heavily taxed the importation of alcoholic beverages[, *a fortiori*, tobacco products]. See 1997 S.C., ch. 36, §§21.1(1), 21.2(1); Excise Act Schedule I.(1), R.S.C., ch. E-14 (1985); Excise Act 2001, Schedule 4, ch. 22, 2002 S.C. 239."

Firstly, with respect to the Excise Act, 2001, P.C. 2003-388, dated March 27, 2003, provides as follows:

> Her Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 433 of the *Excise Act, 2001*, assented to on June 13, 2002, being chapter 22 of the Statutes of Canada, 2002, hereby fixes
>
> (a) April 1, 2003, as the day on which sections 2, 4, 7 to 12, 14 to 24, 159, 211, 219 to 229, 304, 322 and 323 of that Act come into force; and
>
> (b) July 1, 2003, as the day on which sections 3, 5, 6, 13, 25 to 158, 160 to 210, 212 to 218, 230 to 303, 305 to 321 and 324 to 407 of that Act and Schedules 1 to 7 to that Act come into force.

Secondly, with respect to the Excise Act, R.S.C. 1985, c. E-14, Petitioner contends that the duties or taxes

applicable pursuant to the Excise Act only apply, for example, to tobacco products which have been manufactured in or imported into Canada by individuals or corporations *licensed thereunder* (e.g., distillers and brewers or tobacco and cigar manufacturers). Moreover, for example, tobacco products which have not been manufactured in or imported into Canada within this licensing scheme are not subject to taxes or duties; thus, the relevancy of *Cleveland v. United States,* 531 U.S. 12 (2000). That is not to say, however, that Canadian police will not seize such tobacco products if found in the possession of any unlicensed individual and *criminally* charge the unlicensed individual under the criminal as opposed to regulatory provisions of the Excise Act for such possession and, upon conviction, exact excessive fines and, perhaps, a term of incarceration (all of which, of course, is subject to any constitutional challenges which may be raised by an individual charged thereunder pursuant to, *inter alia,* the Canadian Charter of Rights and Freedoms). Thus, Petitioner asserts that Canada does not, in fact, impose duties or taxes on *unreported* "imported" tobacco or alcohol products; instead, Canada imposes *criminal* penalties upon those unlicensed individuals found to be in possession of such products under, *inter alia*, section 240(1) of the Excise Act, R.S.C. 1985, c. E-14. Therefore, prosecutions by the United States Government of those individuals involved in "smuggling" activity do not *enforce* Canadian revenue laws. Rather, prosecutions of those individuals who are not licensed under Canada's regulatory schemes, in effect, enforce Canadian penal laws. See *The Antelope*, 10 Wheat. 66, 123 (1825) (Marshall, C.J.) ("[t]he Courts of no country execute the penal laws of another.").

B. Procedural Default – Ineffective Assistance of Counsel.

In answer to the procedural default Petitioner asserts that the legal basis for his claim was not reasonably available to counsel at the time his plea was entered. See *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000); *Cleveland v. United States*, 531 U.S. 12 (2000). See also

Pasquantino v. United States, 544 U.S. ___ (2005). In support of this averment, Petitioner relies on *Reed v. Ross*, 468 U.S. 1, 16 (1984) (a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause for a procedural default).

Further in this respect, Petitioner avers that because he was misinformed as to the true nature of the charge against him his guilty plea therefore was neither knowingly nor intelligently made because he was never informed by the prosecutor, the trial judge or his own lawyer, prior to plea (or any time thereafter), as to which law the government would rely upon in support of its contention that Petitioner defrauded the Canadian government (or the State of New York) of tax revenue (i.e., the "Treaty with the Seven Nations of Canada, 1796, 7 Stat. 55" *or* "1997 S.C., ch. 36, §§21.1(1), 21.2(1); Excise Act Schedule I.(1), R.S.C., ch. E-14 (1985); Excise Act 2001, Schedule 4, ch. 22, 2002 S.C. 239"). See *Brady v. United States*, 397 U.S. 742, 748 (1970) (A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent."); see also *Smith v. O'Grady*, 312 U.S. 329, 334 (1941) (a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."); *Bousley v. United States*, 523 U.S. 614 (1998); *Murray v. Carrier*, 477 U.S. 478 (1986); *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Pasquantino*, at ___ (slip op., at 20, at n. 13), this Court itself recognized that "[m]any such schemes will necessarily require interpretation of foreign law. Without proof of foreign law, it is impossible to tell whether the scheme had the purpose of depriving the foreign corporation or individual of valuable property interests as defined by foreign law." In light of such, Petitioner avers that the failure of the prosecutor to identify the foreign revenue law upon which the government relied in support of the allegation that the Petitioner deprived the Canadian government (or the State of New York) of its "right" to collect money in tax and duty revenue, prior to plea, operated unfairly and to the prejudice of the Petitioner. Moreover, the failure of his legal counsel to seek the

identification of such revenue laws rendered his legal counsel "ineffective." Indeed, without identifying the Canadian revenue laws upon which the Canadian government relied in support its "right" to collect tax and duty revenue prior to the Petitioner entering a plea of "guilty", how could it be said that Petitioner's legal counsel rendered "adequate legal assistance"? Moreover, Petitioner asserts that the failure of the government to identify such revenue laws violated his right to the effective assistance of counsel because it interfered with the ability of counsel to make independent decisions about how to conduct the case.

Additionally, although Fed. R. Crim. P. 26.1 addresses Petitioner's concern that courts lack the competence to examine the validity of unfamiliar foreign tax schemes by setting forth a procedure for interpreting foreign law that permits a court, in deciding issues of foreign law, to consider "any relevant material or source – including testimony – without regard to the Federal Rules of Evidence", Petitioner avers that his counsel lacked the competence to raise any issues with respect to the validity of unfamiliar foreign tax schemes in the first instance. This lack of skill and knowledge, in effect, deprived the Petitioner of an "ample opportunity to meet the case of the prosecution" to which he was entitled; thus, denied Petitioner the right to the effective assistance of counsel and due process.

Finally, Petitioner avers that the Court need look no further as proof of the prejudice to the Petitioner in such circumstances than the case of *Pasquantino* wherein the government introduced *uncontroverted* "proof" of Canada's supposed taxing authority, in part, by virtue of the Excise Act, 2001, which, as shown above, was not in force until April 1, 2003 and July 1, 2003 – and clearly non-existent "between 1996 and 2000".

III. CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests the Court to grant his petition for rehearing.

Respectfully submitted,

JOHN FOUNTAIN *pro se*

CERTIFICATE OF PETITIONER

As Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

_____

John Fountain
pro se